

1
2
3
4
5

6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA

8
9
10 PATRICK THOMAS DONOVAN, No. C 07-2240 WHA (PR)
11 Plaintiff, DISMISSAL WITH LEAVE TO
12 v. AMEND
13 BAY AREA COMMUNITY
14 RESOURCE DAY TREATMENT
PROGRAM and JOSE LUIS GOMEZ,
15 Defendants.
16 _____ /

17 Plaintiff, an inmate of the Marin County Jail, has filed a pro se civil rights complaint
18 under 42 U.S.C. § 1983. Plaintiff also requests leave to proceed in forma pauperis.

19 **DISCUSSION**

20 **A. STANDARD OF REVIEW**

21 Federal courts must engage in a preliminary screening of cases in which prisoners seek
22 redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
23 § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims
24 which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek
25 monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro
26 se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699
27 (9th Cir. 1990).

28 ///

1 Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the
2 claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the
3 statement need only ""give the defendant fair notice of what the . . . claim is and the grounds
4 upon which it rests."" *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (citations omitted).
5 Although in order to state a claim a complaint "does not need detailed factual allegations, . . . a
6 plaintiff's obligation to provide the 'grounds of his 'entitle[ment] to relief' requires more than
7 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not
8 do. . . . Factual allegations must be enough to raise a right to relief above the speculative
9 level." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (citations omitted). A
10 complaint must proffer "enough facts to state a claim for relief that is plausible on its face." *Id.*
11 at 1986-87.¹

12 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:
13 (1) that a right secured by the Constitution or laws of the United States was violated, and (2)
14 that the violation was committed by a person acting under the color of state law. *West v. Atkins*,
15 487 U.S. 42, 48 (1988).

16 **B. LEGAL CLAIMS**

17 Plaintiff was in a program at the Marin County Jail called "Bay Area Community
18 Resource Day Treatment Program" ("BACR"). He identifies it as a "County of Marin agency."
19 Defendant Gomez is the "staff manager." Plaintiff contends that Gomez told a BACR conflict
20 resolution committee consisting of three inmates that plaintiff had abruptly stopped taking his
21 mental health medication, rather than tapering off, and was refusing to take the medication.
22 Plaintiff wrote a grievance objecting to what he viewed as the release of private medical
23 information, and was shortly thereafter expelled from the BACR program and moved to a

24
25 ¹ *Bell Atlantic Corp.* disapproved the "no set of facts" language in *Conley v. Gibson*,
26 355 U.S. 41 (1957). *Conley* had stated "the accepted rule that a complaint should not be
27 dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can
28 prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-46.
Bell Atlantic Corp. decided that "this famous observation has earned its retirement. The
phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard."
Bell Atlantic Corp., 127 S. Ct. at 1969.

United States District Court
For the Northern District of California

1 different housing unit. He contends that was in retaliation for his grievance.

2 Prisoners may not be retaliated against for using grievance procedures. *Rhodes v.*
3 *Robinson*, 408 F.3d 559, 567 (9th Cir. 2005). Plaintiff has not, however, alleged that defendant
4 Gomez had any role in the retaliatory actions, and as to defendant BARC itself, has not alleged
5 that the actions taken against him were pursuant to a policy or practice of that county agency.
6 See *Plumeau v. School Dist. #40 County of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997). Nor has
7 he alleged that there was no legitimate penological purpose to the actions, something which it is
8 his burden to plead. See *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995). For these reasons
9 the compliant will be dismissed with leave to amend.

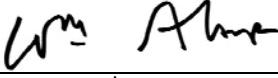
10 CONCLUSION

11 1. The complaint is **DISMISSED** with leave to amend, as indicated above, within thirty
12 days from the date of this order. The amended complaint must include the caption and civil
13 case number used in this order and the words AMENDED COMPLAINT on the first page.
14 Because an amended complaint completely replaces the original complaint, plaintiff must
15 include in it all the claims he wishes to present. See *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262
16 (9th Cir. 1992). He may not incorporate material from the original complaint by reference.
17 Failure to amend within the designated time will result in the dismissal of these claims.

18 2. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the court
19 informed of any change of address by filing with the clerk a separate paper headed "Notice of
20 Change of Address." Papers intended to be filed in this case should be addressed to the clerk
21 and not to the undersigned. Petitioner also must comply with the Court's orders in a timely
22 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
23 pursuant to Federal Rule of Civil Procedure 41(b).

24 IT IS SO ORDERED.

25
26 Dated: October 15, 2007.


27 WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

28 G:\PRO-SE\WHA\CR.07\DONOVAN240.DWLTA.wpd